June 28, 2002

Via Email Only: tsrforum@ftc.gov

Office of the Secretary
Federal Trade Commission
Room 159
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: FTC TSR Forum—Supplementary Comments

Ladies and Gentlemen:

The American Resort Development Association ("ARDA") was pleased to participate in the Commission's forum regarding its proposed revisions to the TSR. ARDA wants to thank the Commission staff for their hospitality and professionalism during the forum. In briefly summarizing its position on various aspects of the proposed Rule, ARDA incorporates by reference both sets of written comments previously submitted and its comments provided during the forum.

There are legitimate concerns regarding both the statutory authority of the Commission to establish a national Do-Not-Call registry and potential constitutional issues with the Rule, should it be promulgated as originally proposed. These concerns aside, ARDA continues to believe a reasonable, well-defined structure for creating and maintaining a preemptive registry would be beneficial both to the telemarketing industry and to consumers. Further, several of the Commission's other proposed changes have merit and, with some modification, could achieve the balance that we are all seeking, while avoiding legal objections that could imperil the rule.

In keeping with our promise to be brief, ARDA supports the following:

1. A national Do-Not-Call registry that preempts all state lists. It is imperative, under the Privacy Act, that Congress (or the Commission) preempts state laws in this area in order for the Commission to responsibly maintain the integrity of consumers' personal information and to lessen arbitrary application. Further, the additional cost of another list, on top of the multitude of state lists, would be unbearable. There would be a disproportionate impact on smaller businesses. The Commission is obligated to consider the potential impact on small business and its obligations to maintain fairness in regulatory enforcement on small businesses. Finally, the Commission must defer to Congress on the ability to charge user fees for the proposed national registry as it would in the case of FOIA and similar charges. (This latter issue is

addressed further in ARDA's response to the Commissions' NPRM dated May 24, 2002, which is filed separately.)

2. An exemption for preexisting relationships is essential to a balanced and constitutional national registry. As noted in the forum, to remove this exception, which the industry has been working with under both the FCC and state requirements, would result in a drastic change in operations and increase costs substantially. The extension of this reasoning to prior business relationships (with a reasonable cut-off period) and affinity relationships, for which the consumer has a legitimate expectation of contact, is both logical and economically necessary. Absent these exceptions, the Rule will have the unintended result of not permitting consumers to receive calls from those businesses it may desire to hear from, particularly in circumstances where such a desire could be inferred from their relationship. Such a restriction, without substantial basis in fact for its exclusion, would necessarily result in arbitrary application. As was duly noted in the forum, it would be imperative, particularly under section 553, that the Commission allow comment on any definition of "established business relationship" it produces as interested parties would have not had the prior opportunity to comment on the precise language of that definition.

3. Third parties, other than a spouse or legal guardian, should not be permitted to register consumers on the registry. This will only lead to the types of fraud that the Commission is seeking to prevent by revising the TSR. Further, to permit third parties to register consumers would require the Commission to adopt a new regulatory structure and increase the costs of the proposed registry even more than previously anticipated.

4. Telemarketers should not be explicitly required to purchase the list or be presumed in violation of the Rule for not purchasing the list. If a third party telemarketing firm purchases one list that could be used by several of its seller customers, then that one list (with any area code extensions particular to a given seller) should be sufficient to address the concerns of the Commission.

5. A zero abandonment rate for predictive dialers is not feasible from both a cost and operations standpoint. As noted in the forum, a predictive dialer with a zero error rate is no longer "predictive" and dissipates any advantage to using the technology. Further, a zero error rate ignores the fact that unintentional errors may occur. A rate between three and five percent is reasonable.

6. An "upsell" should not be treated as an "outbound call." As it was pointed out during the forum, such classification would require new training of telemarketers. Further, inbound and outbound telemarketers are often set up in different facilities because of the diversity in their operations and to increase economies of scale for similar procedures. Businesses would likely have to close facilities, thereby costing local communities in terms of jobs and

tax revenue. The proposal would require changes in operations at significant costs to business. A separate definition and treatment of "upsells" would be appropriate.

7. The Rule should allow flexibility in the obtaining of express verifiable authorizations for charges. Given the rapid changes in technology and marketing media (particularly the Internet), sellers should be permitted to obtain authorization by tape verification, in writing, or any other viable and secure method (such as electronic signatures, as noted in ARDA's written comments).

8. The fine for one violation of the do-not-call provision goes far beyond a reasonable deterrent. This is a point ARDA believes did not come out in the forum. The fine was originally imposed to deal with unfair and deceptive practices under section 5 of the FTC Act. An $11,000 fine for one call made to a number on the registry is excessive. If there is an intentional pattern of calling in disregard of the registry, then punitive fines such as this are more likely justifiable.

Finally, ARDA believes the forum, while extremely beneficial, posed as many questions as it resolved. The current state of the law is sufficiently confusing. For example, media reports surrounding the proposed Rule and the forum touted that anywhere from 15 to 25 states currently have do-not-call laws. This confusion stresses the importance not only of a national, preemptive registry with reasonable exceptions, but the necessity for additional review of the Rule.

As a result of the comments submitted, the Commission hopefully will make significant changes to its original proposal. Therefore, as a matter of both good practice and possible legal compliance, the Commission should allow an additional comment period for any final rule it intends to promulgate. ARDA would enthusiastically participate in any additional comment period.

Once again, thank you for the opportunity to express the position of more than 800 members of the vacation timeshare industry. We hope that our comments have been helpful.

Sincerely,

Sandra Yartin DePoy
Director of Federal Relations

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Chairman, Joint Subcommittee on
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